No. 93-983

Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

MICHAEL WALFORD CLARKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven A. Bernholz
BERNHOLZ & HERMAN
Suite 300, The Center
1506 East Franklin Street
Chapel Hill, NC 27514
(919) 929-7151

Counsel for Petitioner

39 pp

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTION PRESENTED FOR REVIEW

1. Under the Fourth Amendment, does a third party's valid consent to the general search of a car extend to a locked container within the car, when the third party disclaims any ownership interest in the container and the officer conducting the search makes no inquiry into the third party's authority to consent to the search of the container?

TABLE OF CONTENTS

Question Presented for Review i

Table of Authorities iv

Opinion Below 2

Jurisdiction 2

Constitutional Provision Involved ... 2

Statement of the Case 3

Reasons for Granting the Writ 10

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE, IN AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS, THE COURT OF APPEALS RENDERED AN OPINION IN CONFLICT WITH UNITED STATES v. WELCH, 4 F.3d 761 (9th Cir. 1993) AND THE PROPER APPLICATION OF THIS COURT'S DECISIONS IN FLORIDA v. JIMENO, ___ U.S. ___, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991) AND ILLINOIS v. RODRIGUEZ, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990) 10

Conclusion 22

Certificate of Service 23

Appendix

Opinion of the United States Court of Appeals for the Fourth Circuit .....App. 1

TABLE OF AUTHORITIES

Cases:

Florida v. Jimeno,
___ U.S. ___, 111 S. Ct. 1801,
114 L.Ed.2d 297 (1991) 10, 12, 13

Illinois v. Rodriguez,
497 U.S. 177, 110 S. Ct. 2793,
111 L.Ed.2d 148 (1990) 10, 11, 13

United States v. Brown,
961 F.2d 1039 (2d Cir. 1992) 17

United States v. Karo,
468 U.S. 705, 104 S. Ct. 3296,
82 L.Ed.2d 530 (1984) 16, 18, 21

United States v. Matlock,
415 U.S. 164 (1974) ... 13, 15, 16, 19

United States v. Salinas-Cano,
959 F.2d 861 (10th Cir. 1992) 16

United States v. Welch,
4 F.3d 761 (9th Cir. 1993) .....
..... 10, 13, 14, 19, 21

United States v. Whitfield,
939 F.2d 1071 (D. C. Dir. 1991) ... 16

Constitutional Provisions:

United States Constitution,
Amendment IV 2

Statutes:

18 U.S.C. § 3231 3

21 U.S.C. § 841(a)(1) and (b)(1)(A). 3

28 U.S.C. § 1254(1) 2

Federal Rules of Criminal Procedure,
Rule 12(b)(3) 3

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MICHAEL WALFORD CLARKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Michael Walford Clarke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit regarding the Fourth Amendment issue raised therein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and appears at Appendix ("App.") 1.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its Opinion on 28 September, 1993 (App. 1). This petition is filed within ninety (90) days of that Opinion. Jurisdiction of this Court is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .".

STATEMENT OF THE CASE

On April 27, 1992, Petitioner, Michael Walford Clarke, was indicted in the United States District Court for the Middle District of North Carolina, Durham Division, for possessing with intent to distribute over 500 grams of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). Subject matter jurisdiction existed in the United States District Court for the District of North Carolina under 18 U.S.C. § 3231.

On June 12, 1992, pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, Clarke filed a pre-trial motion to suppress 567.8 grams of crack

cocaine contained in a locked toolbox seized on April 7, 1992. The evidenced adduced at the suppression hearing in the District Court tended to show the following:

On April 7, 1992, Virginia State Trooper Mark Wilkinson was on duty in Prince William County in the Eastern District of Virginia. At approximately 8:00 a.m., he was patrolling in a rest area off of Interstate 95 and observed a red Toyota parked in the rest area. Trooper Wilkinson saw two people in the car who appeared to be sleeping. He also saw that the vehicle's headlights were on and the engine was off.

Concerned "that the vehicle's battery might run down," Trooper Wilkinson approached the vehicle and advised the driver that the headlights

were on, and asked for identification. The driver, later identified as Jane Lattimer, gave the Trooper her driver's license and a rental agreement for the car. The rental agreement was for a Ford Escort, not a Toyota. Trooper Wilkinson asked Lattimer and the only passenger in the car, Robert Womack, whether they had any contraband in the car. Both replied that they did not.

Although neither Lattimer nor Womack were engaged in any suspicious or illegal activity, Trooper Wilkinson advised them that he was looking for contraband, weapons, or controlled substances. He then obtained verbal consent from Lattimer to search the car. In addition, he had Lattimer sign a written "consent form" authorizing a "complete search of

my vehicle." The consent form further stated:

> These officers are authorized by me to seize from my vehicle any letters, papers, materials, or other items they may have reason to believe are connected with a crime.

Trooper Wilkinson's search of the interior of the car revealed no contraband. He then searched the trunk of the car. During that search, he noticed that the spare tire had been removed from the wheel-well holder and was lying flat down in the trunk. When he looked into the wheel-well holder (which was covered by felt carpeting over the floor of the trunk) he saw a blue, opaque, plastic toolbox secured by a combination lock. He asked Lattimer and Womack whether the box belonged to them, and both said "No." Trooper Wilkinson

then, without any further inquiry, seized the toolbox and broke it open by ripping out the end panels. He did not have a warrant. In the box he found in excess of 500 grams of "crack" cocaine. At all times, Lattimer did not appear to be nervous and was polite.

Lattimer testified that she had been given the locked toolbox by Christopher Clarke in Norwalk, Connecticut, with instructions to deliver the box to Christopher's brother, Michael, in Durham, North Carolina. While she didn't know what was in the toolbox, she suspected that it contained cocaine. She did not have permission to give the box to anyone else, and she did not know the combination to the lock. Christopher had also supplied her with the rental car, and had paid her $900 to make the

delivery. She said that Womack knew nothing about the toolbox and was just accompanying her on her drive from Norwalk to Durham.

Petitioner, Michael Clarke, testified that in early April, 1992 he had telephoned his brother, Christopher, in Norwalk, Connecticut, to make arrangements for the delivery of the cocaine. Pursuant to those arrangements, Michael sent Christopher money to purchase the toolbox and a combination lock. After purchasing the box, Christopher telephoned Michael to give him the combination. Christopher then obtained a rental car, and employed Lattimer to drive from Norwalk to Durham with the locked box and deliver it personally to Michael. Because Lattimer

was not to be trusted, she was not given the combination to the box.

After Trooper Wilkinson seized the toolbox, tore it open, and found the cocaine, Lattimer was promptly arrested. She then agreed to cooperate with federal agents to make a controlled delivery of the box and cocaine to Michael Clarke in Durham. After the delivery was made, Michael was arrested and charged under the instant Indictment.

The District Court concluded that while Petitioner had standing to contest the alleged, unlawful search and seizure of the toolbox and its contents, the seizure and search of the box was made pursuant to valid consent. On appeal, the Fourth Circuit "assumed" for the purposes of its opinion that Clarke had

standing,[1] but affirmed the denial of the motion to suppress on grounds of valid consent.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE, IN AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS, THE COURT OF APPEALS RENDERED AN OPINION IN CONFLICT WITH UNITED STATES v. WELCH, 4 F.3d 761 (9th Cir. 1993) AND THE PROPER APPLICATION OF THIS COURT'S DECISIONS IN FLORIDA v. JIMENO, ___ U.S. ___, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991) AND ILLINOIS v. RODRIGUEZ, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990).

In Florida v. Jimeno, ___ U.S. ___, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991), this Court reiterated the standard set forth in Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed. 2d 148

---

[1] Consequently, the question of standing is not an issue in this Petition.

(1990) for determining the valid scope of a consensual search: "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" 111 S. Ct. at 1803-04. As otherwise stated in Rodriquez,

> . . . determination of consent to enter must 'be judged against an objective standard': would the facts available to the officer at the moment. . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises? Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.

110 S. Ct. at 2801. (Emphasis added).

In applying this standard, this Court held in Jimeno that it was "reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor in the car." 111 S. Ct. at 1804. However, this Court went on to expressly state that:

> The facts of this case are therefore different from those in *State v. Wells*, [539 So.2d 464 (1989) *aff'd on other grounds*, 495, U.S. ___, 110 S. Ct. 1632 (1990)], on which the Supreme Court of Florida relied in affirming the suppression order in this case. There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.

111 S. Ct. at 1804. (Emphasis added).

In the instant case, the Fourth Circuit Court of Appeals concluded that, under Jimeno, the search of the locked toolbox did not exceed the scope of the consent to search because "Latimer's verbal consent extended to the vehicle, its contents and containers." The Court also concluded that, under Rodriguez,

> . . . Latimer had apparent authority to consent to the search of the toolbox. The denial of ownership could lead Trooper Wilkinson to reasonably conclude that Latimer and Womack did not own the box, but that Latimer, as driver of the vehicle, had possession and control of the box, and thus actual authority under United States v. Matlock, 415 U.S. 164, 171 (1974).

This application of the principles established in Jimeno and Rodriguez is in conflict with that given in United States v. Welch, 4 F.3d 761 (9th Cir. 1993).

In Welch, Welch's codefendant, McGee, gave oral and written consent to a general search of a rental car that McGee and Welch had driven to Las Vegas. Pursuant to that consent, the officers searched Welch's purse which was found in the trunk of the car. In reversing the District Court's denial of Welch's motion to suppress the contents of the purse, the Ninth Circuit began its analysis by stating:

> The dispositive issue in this case is not what areas of the car McGee may have intended his consent to encompass, whether or not he intended to authorize a search of any of the car's contents, or even what constitutes an objectively reasonable interpretation of his statements to the officers. Rather the issue is whether McGee had the authority, either actual or apparent, to give effective consent to the search of his companion's purse.

4 F.3d at 764. (Emphasis in original).

On the question of actual authority to consent, the Ninth Circuit noted that under United States v. Matlock, 415 U.S. 164, 171 n. 7, 94 S. Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974), such authority could be shown if there was "persuasive evidence of both shared use and joint access to or control over a searched area. . .". 4 F.3d at 764 (Emphasis in original). Because McGee had joint access to and mutual use of the car with Welch, he (McGee) had actual authority to consent to a general search of the car. On the other hand, the Court said:

> Welch's purse is another matter entirely. The fact that she had a limited expectation of privacy in the car by virtue of her sharing arrangement with McGee does not mean that she had similarly limited privacy expectations in items within the car which are independently the subject of such expectations. The shared

> control of "host" property does not serve to forfeit the expectation of privacy in containers within that property. See United States v. Karo, 468 U.S. 705, 725-27, 104 S. Ct. 3296, 3308-10, 82 L.Ed.2d 530 (1984) (O'Connor, J., concurring).

Id. Because there was nothing in the record to demonstrate that McGee had joint access to or shared control over the contents of Welch's purse, the government could not establish McGee's actual authority to consent to a search of the purse under Matlock.

On the question of apparent authority to consent, the Ninth Circuit noted at the outset that this doctrine is applicable only if the facts believed by the officers to be true would justify the search as a matter of law. Id. (citing United States v. Salinas-Cano, 959 F.2d 861, 865-66 (10th Cir. 1992); United

States v. Whitfield, 939 F.2d 1071, 1073-74 (D. C. Dir. 1991); United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992). The Court then reasoned:

> When the security officers decided to search Welch's purse, they knew that 1) she was McGee's girlfriend, 2) she had travelled with him to Las Vegas in the rental car, and 3) the handbag in the trunk of the car belonged to a woman. There is nothing about these facts that would have led a reasonable officer to believe that Welch had expressly given McGee authority to consent to the search of the purse. Nor would any of these facts have caused a reasonable officer to believe that McGee shared the use of and had joint access to or control over Welch's purse and that the search was justified for that reason. Moreover, any such belief would have necessarily rested on the erroneous legal assumption that the mere presence of the handbag in the trunk gave McGee control over it or access to its contents, or, to put it differently, that Welch's leaving the purse in the car gave McGee the right to open it

> without her consent. Such an assumption would have been erroneous and would have reflected a mistaken belief as to the law. See Karo, 468 U.S. at 725-27, 104 S. Ct. at 3308-10 (O'Connor, J., concurring). Therefore, the facts available to the officers at the time of the search do not support application of the apparent authority doctrine. * * * *
>
> For all these reasons, the security officers were required, at a minimum, to inquire further before assuming that McGee's consent was sufficient to authorize them to open the purse they discovered during their search of the automobile.

4 F.3d at 765.

In the instant case, the opinion of the Fourth Circuit sharply conflicts with the legal principles and analysis employed by the Ninth Circuit. For example, while the Fourth Circuit focuses on the scope of Lattimer's consent as extending not only to the vehicle but its

contents and containers, the Court ignored the fundamental issue identified in Welch of whether Lattimer "had the authority, either actual or apparent," 4 F.3d at 764, to give effective consent to a search of the locked toolbox and its contents.

On the question of actual authority to consent, the Fourth Circuit merely said that it was reasonable for Wilkinson to conclude "that Latimer, as driver of the vehicle, had possession and control of the box, and thus actual authority under United States v. Matlock, 415 U.S. 164, 171 (1974)." This reasoning is entirely at odds with Welch's distinction between having joint access to or control over the general area of a car, as against access to or control over discreet containers within that general

area. 4 F.3d at 764. It also ignores Lattimer's specific disclaimer of any ownership interest in the box, and the evidence established at the suppression hearing that she in fact didn't have any access to the contents of the box because she didn't have the combination to the lock.

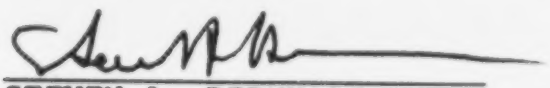
Finally, on the question of apparent authority, while the Fourth Circuit acknowledged that "[t]he denial of ownership could lead Trooper Wilkinson to reasonably conclude that Latimer and Womack did not own the box," the Court's conclusion that apparent authority existed ignores the principle that this doctrine is applicable only if the facts believed by the officer to be true would justify the search as a matter of law. 4 F.3d at 764. Nothing in these facts

would have led a reasonable officer to believe that Lattimer had any authority to consent to the search of the box, or that she shared the use of and had joint access to its contents. See 4 F.3d at 765. Moreover, "[s]uch an assumption would have been erroneous and would have reflected a mistaken belief as to the law" Id., (citing Karo, 468 U.S. at 725-27, 104 S. Ct. at 3308-10). Instead, Welch's analysis would have required the trooper to inquire further before assuming that Lattimer's consent was sufficient to search the box, particularly in the face of the fact that Lattimer denied any ownership of the box. See Id.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for the issuance of a writ of certiorari.

Respectfully submitted,



STEVEN A. BERNHOLZ

Suite 300, The Center
1506 East Franklin Street
Chapel Hill, North Carolina 27514
(919) 929-7151

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served the foregoing Petition for Writ of Certiorari by depositing a copy of the same, postage prepaid, in the United States addressed to: Robert M. Hamilton, Assistant United States Attorney, Post Office Box 1858, Greensboro, North Carolina 27402, and the Solicitor General, Department of Justice, 10th St. & Constitution Avenue, N.W., Washington, D.C. 20530.

This the 14th day of December, 1993.

STEVEN A. BERNHOLZ

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	) No. 92-5706
MICHAEL WALFORD CLARKE, a/k/a "G", *Defendant-Appellant.*	)

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., Chief District Judge.

(CR-92-75)

Submitted: March 3, 1993

Decided: September 28, 1993

Before WIDENER, WILKINSON, and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

G. Nicholas Herman, BERNHOLZ & HERMAN, Chapel Hill, North Carolina, for Appellant. Robert H. Edmunds, Jr., United States Attorney, Robert M. Hamilton, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Michael Clarke appeals from the decision of the district court denying his motion to suppress 567.8 grams of "crack" cocaine found in a locked toolbox in a rented vehicle driven by another.

For the reasons stated below, we affirm the order of the district court.

Christopher Clarke, pursuant to an agreement with his brother, Michael Clarke, purchased a toolbox and a combination lock with money sent from Michael, placed "crack" cocaine in the toolbox, arranged for a rented vehicle for Jane Latimer, and paid Latimer $900 to transport the toolbox from Connecticut to North Carolina. Latimer was instructed to deliver the box only to Michael.

When the rental vehicle was delivered to Latimer, the toolbox was in the trunk of the car. She further concealed it be placing the toolbox in the spare tire wheel well. Because the brothers did not trust Latimer, she was not given the combination to the lock on

the toolbox. On the morning of April 7, 1992, Latimer and her companion, Robert Womack, stopped at a rest area in Virginia. Mark Wilkinson of the Virginia State Police noted that the vehicle, a red Toyota, was parked with the headlights on, the motor off, and both passengers appeared to be sleeping. Wilkinson approached the vehicle, advised Latimer that the lights were on, and asked for identification. Latimer produced her identification and a rental agreement for a Ford Escort. Wilkinson then asked Latimer and Womack if they were carrying any contraband. They replied that they were not. Wilkinson requested permission to search the vehicle, its contents and containers for controlled substances, contraband, and weapons. Latimer gave her consent, both

orally and in writing.

While search the trunk compartment, Wilkinson discovered the toolbox. After Latimer and Womack denied ownership, Wilkinson tore open the toolbox and discovered 567.8 grams of crack cocaine. A controlled delivery was made, and Clarke was arrested and indicted for possession with intent to distribute over 500 grams of cocaine base.

After a hearing on Clarke's motion to suppress, the district court found that Latimer had exercised control over the vehicle and its contents,[1] that

---

[1] The court noted that the trunk contained personal items other than the toolbox, and Latimer testified that she had acted to further conceal the toolbox by moving it from the general trunk compartment into the spare tire wheel well. Latimer also testified that this was her third delivery of a locked toolbox from Christopher to Michael, and that she knew or suspected that the box contained cocaine.

Trooper Wilkinson had obtained verbal consent to search the vehicle, its contents and containers, and this consent was not withdrawn or limited by Latimer's denial of ownership of the toolbox. The district court concluded that Clarke had a legitimate expectation of privacy in the toolbox and its contents, and therefore had standing to challenge the search and seizure on Fourth Amendment grounds, but Latimer had actual and apparent authority to consent to the search. Clarke's motion to suppress was denied.

Although the United States argues that Clarke lacks standing to challenge the search, for purposes of this opinion standing is assumed.

The scope of the consent is that which a reasonable person would have

understood from the interchange between the officer and the person granting consent. *Florida v. Jimeno,* 59 U.S.L.W. 4471 (U.S. 1991). Latimer's verbal consent extended to the vehicle, its contents and containers. Clarke argues that Latimer's written consent to search encompassed only items reasonably believe to be connected with a crime. However, the written consent provided unlimited authority to search, and consented to seizure of those items the officer "may have reason to believe are connected with a crime." Wilkinson was in the process of searching the vehicle when he discovered the toolbox. The search continued as he opened the toolbox and discovered the cocaine. Wilkinson only seized the toolbox after discovering its contents, at which time he had "reason to

believe [the item was] connected with a crime." Thus, we reject this argument that the trooper exceeded the scope of the consent to search.

Clarke next argues that Latimer lacked the authority to consent to a search of the toolbox. A warrantless search is valid if based upon consent of a third party whom police reasonably believe has authority over the object, but who does not. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The determination of consent must be judged against an objective standard: whether the facts available to the officer at that moment would justify a person of reasonable caution in believing that the consenting party had authority over the item. *Rodriguez*, 497 U.S. at 188 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

We find that Latimer has apparent authority to consent to the search of the toolbox. The denial of ownership could lead Trooper Wilkinson to reasonably conclude that Latimer and Womack did not own the box, but that Latimer, as the driver of the vehicle, had possession and control of the box, and thus actual authority under *United States v. Matlock*, 415 U.S. 164, 171 (1974). The search was not unreasonable under the Fourth Amendment.[2] *See Rodriguez*, 497 U.S. at

---

[2] We find *United States v. Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991), distinguishable on its facts. In *Whitfield*, the officials had particularized suspicion that Whitfield was involved in a crime, the search was in the defendant's home, and without further inquiry, the officers could not have reasonably concluded that Whitfield's mother had actual authority to consent to the search of the defendant's bedroom. In this case, the officer had no knowledge of Clarke's interest in the toolbox found in a vehicle operated by a third person.

185-89.

Accordingly, we affirm the decision of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

(2)

No. 93-983

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL WALFORD CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

VICKI S. MARANI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the search of a toolbox found in the trunk of a car was justified by the officer's reasonable belief that the driver had authority to consent to the search.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Florida v. *Jimeno*, 111 S. Ct. 1801 (1991)	4, 7
Illinois v. *Rodriguez*, 497 U.S. 177 (1990)	4, 5, 7
United States v. *Clarke*, 2 F.3d 81 (4th Cir. 1993), petition for cert. pending, No. 93-6938	8
United States v. *Matlock*, 415 U.S. 164 (1974)	6
United States v. *Welch*, 4 F.3d 761 (9th Cir. 1993)	8, 9

Constitution and statute:

U.S. Const. Amend. IV	3, 4, 5
21 U.S.C. 841(a)(1)	2

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-983

MICHAEL WALFORD CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not reported, but the judgment is noted at 7 F.3d 227 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1993. The petition for a writ of certiorari was filed on December 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On his conditional plea of guilty in the United States District Court for the Middle District of North Carolina, petitioner was convicted of posses-

sion of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 1. He was sentenced to 151 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed in a per curiam, unpublished opinion. Pet. App. 1-10.

1. On April 6, 1992, petitioner and his brother, Christopher Clarke, arranged for Jane Latimer to bring a toolbox from Christopher, who lived in Connecticut, to petitioner, who lived in North Carolina. Christopher paid Latimer $900 to make the delivery and provided her with a rental car. He then locked a quantity of cocaine inside a plastic toolbox and put the toolbox into the trunk of the car. Christopher did not give Latimer the combination to the lock. Because Latimer had twice before delivered locked toolboxes to petitioner, she suspected that the toolbox contained cocaine, and she hid it in the spare tire well. Pet. App. 3-4, 5 n.1; C.A. App. 38-44, 46, 50-51, 53-58.

On the morning of April 7, 1992, Latimer and her companion, Robert Womack, stopped at a rest area off a highway in Virginia. At about 8:00 a.m., Trooper Mark Wilkinson of the Virginia State Police noticed that their car, a red Toyota, was parked with its headlights on and its motor off, and that they appeared to be sleeping. Wilkinson informed Latimer, who was behind the wheel, that the lights were on and asked her for identification. Latimer produced her identification and a rental agreement for a Ford Escort. Wilkinson then asked her and Womack if they were carrying any contraband. When they said that they were not, Wilkinson asked Latimer for permission to search the car and its contents and containers for controlled substances, contraband, and weapons.

Latimer consented both orally and in writing. Pet. App. 4-5; C.A. App. 45-46, 49, 71-76, 81-85, 88, 139.

Wilkinson searched the passenger compartment and the trunk. In the trunk, which contained a variety of personal items, Wilkinson noticed that the spare tire lay outside the wheel well, and the well was concealed by a carpet cover. Wilkinson lifted the cover and found a plastic toolbox. He asked Latimer and Womack if the box belonged to either of them, and both denied ownership. Wilkinson then pulled the sides off the box, which was of flimsy construction, and discovered what turned out to be 567.8 grams of cocaine base. He arrested Latimer and she agreed to make a controlled delivery of the cocaine base to petitioner. When petitioner accepted the drugs from Latimer, he was arrested. Pet. App. 5 & n.1; C.A. App. 47-49, 53-55, 76-82, 86-87.

2. After a hearing, the district court denied petitioner's motion to suppress the cocaine base. Pet. App. 5-6. The court found that petitioner had a legitimate expectation of privacy in the toolbox, but that Latimer had actual and apparent authority to consent to the search of both the car and the trunk and their contents and containers.[1] *Id.* at 6. Because Latimer had given her oral and written consent to a search that included containers within the trunk, the court held that the search of the toolbox did not violate petitioner's Fourth Amendment rights. *Ibid.*

---

[1] The court explained that Latimer "had apparent authority to [consent], being in control of the vehicle and its contents." C.A. App. 115. The court further explained that "even though the tool box was locked," Latimer had "actual authority to consent to the search" because "she was a co-conspirator in this drug delivery and distribution group." *Id.* at 115-116.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-10. The court rejected petitioner's contention that Trooper Wilkinson's search of the toolbox went beyond the scope of the consent that Latimer had given. *Id.* at 8. The court stated that the scope of consent is measured by the understanding that a reasonable person would draw from the exchange between the officer and the consenting person. *Id.* at 6-7, citing *Florida* v. *Jimeno*, 111 S. Ct. 1801 (1991). Noting that "Latimer's verbal consent extended to the vehicle, its contents and containers," and that her "written consent provided unlimited authority to search, and consented to seizure of those items the officer 'may have reason to believe are connected with a crime,'" the court found that a reasonable person would have understood that Latimer had consented to a search of the toolbox. Pet. App. 7-8.

The court of appeals also rejected petitioner's claim that the search was invalid because Latimer did not have authority to consent to the search of the toolbox. The court of appeals noted that, whether or not Latimer had actual authority to consent, a search is justified under the Fourth Amendment if a reasonable officer would have believed that she had authority to consent. Pet. App. 8, citing *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). Under the apparent authority doctrine, the court observed, the issue is "whether the facts available to the officer at that moment would justify a person of reasonable caution in believing that the consenting party had authority over the item." Pet. App. 8.

The court of appeals found that Latimer had "apparent authority to consent to the search of the

toolbox." Pet. App. 9. While the statements of Latimer and Womack could have persuaded the officer that Latimer and Womack did not own the toolbox, Latimer's status as the driver of the car made it reasonable for the officer to conclude that Latimer "had possession and control of the box, and thus actual authority [to consent to its search] under *United States* v. *Matlock*, 415 U.S. 164, 171 (1974)."[2] *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 10-22) that the court of appeals erred in finding that Jane Latimer had apparent authority to consent to the search of the toolbox in the trunk of her rental car.

In *Illinois* v. *Rodriguez*, *supra*, this Court held that when a reasonable officer would conclude that a person has authority to consent to a search, the search satisfies the requirements of the Fourth Amendment, even if the consenting person lacks actual authority to consent. In this case, the court of appeals held that a reasonable officer would have concluded that Latimer had apparent authority to consent to the search of the toolbox. Even though Latimer disclaimed ownership of the toolbox, the court explained that the officer knew that she was the driver of the car, and she appeared to be in possession and control of the car and its contents. Pet. App. 9.

---

[2] Because the court of appeals agreed that the search was justified under the Fourth Amendment by Latimer's apparent authority to consent, the court did not reach the government's alternative argument that petitioner lacked standing to challenge the search. Pet. App. 6. That basis is also sufficient to support the judgment in this case.

Those facts were sufficient to support a reasonable officer's belief that Latimer had authority to consent to a search of the toolbox, because it appeared that Latimer had "control" over the box "for most purposes." *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974) (upholding third-party consent to search, when the consenting person has "[c]ommon authority" over the place to be searched, in the sense of "joint access or control for most purposes").

Petitioner argues (Pet. 19-21) that a reasonable officer would not have concluded that Latimer's authority to consent to a search extended to the toolbox in the trunk, because Latimer denied owning the box. Ownership, however, is not essential for a person to have the authority to consent to a search. Here, a reasonable officer would have concluded that Latimer's possession and control of the car included possession and control over its containers. Accordingly, it was reasonable for the officer to rely on Latimer's apparent authority to consent to a search of the toolbox.[3]

---

[3] Petitioner suggests (Pet. 21) that a reasonable officer could not have thought that Latimer had authority to consent unless he reasonably believed that Latimer "shared the use of and had joint access to [the toolbox's] contents." That is incorrect. As this Court held in *United States* v. *Matlock*, actual authority to consent to a search can flow from "joint access *or control* for most purposes." 415 U.S. at 171 n.7 (emphasis added). Latimer clearly had "control" over the toolbox by possessing it in the trunk of her rental car (along with her other personal items found in the car's trunk, see C.A. App. 74, 140). Petitioner also errs (Pet. 12-13) in relying on the statement in *Florida* v. *Jimeno*, *supra*, that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the

Petitioner argues (Pet. 21) that, in the face of Latimer's denial of ownership, the officer was required "to inquire further before assuming that [her] consent was sufficient to search the box." While there may be situations in which "the surrounding circumstances could conceivably be such that a reasonable person would doubt" that a person's consent is sufficient, and would "not act upon it without further inquiry," *Illinois* v. *Rodriguez*, 497 U.S. at 188, both courts below concluded that further inquiry was not required in this case. When the trooper found Latimer and Womack asleep in the car, he reasonably concluded that Latimer (who was in the driver's seat) was in control of it. He reviewed Latimer's identification, engaged her in general conversation about her trip, and obtained her consent to search. During the progress of the search, Latimer did nothing to withdraw her consent or to suggest that the officer should stop. Under those circumstances, the courts below correctly concluded that Latimer had apparent authority to consent to the search of the toolbox and that the officer acted reasonably.[4]

---

briefcase within the trunk." 111 S. Ct. at 1804. Here, the officer did not have to draw inferences about the scope of Latimer's consent, because Latimer explicitly consented to a search of containers. Pet. App. 4-5; C.A. App. 88. And, while Latimer denied ownership of the toolbox, she never suggested that her consent to search did not extend to it, and she did not object when the officer opened it.

[4] Petitioner suggests (Pet. 19-20) that the court of appeals erred in ruling that Latimer had actual authority to consent to the search of the toolbox. While the district court held that Latimer had actual authority and the government argued that

2. Petitioner contends (Pet. 13-21) that the decision of the court of appeals in this case conflicts with *United States* v. *Welch*, 4 F.3d 761 (9th Cir. 1993). In that case, Sharon Welch and her male companion, David McGee, had traveled in a rental car to a Las Vegas casino. When casino employees suspected that the two were passing counterfeit bills, security officers—acting at the direction of state law enforcement authorities—escorted Welch and McGee to the security office. After McGee was taken to a separate room, he consented to a search of the rental car in which he and Welch had traveled to Las Vegas. In the trunk, the officers found a woman's purse, and they searched it. After discovering Welch's driver's license and several counterfeit bills inside, they showed the purse to Welch, who identified it as hers. *Id.* at 762-763.

The court of appeals held that McGee lacked actual or apparent authority to consent to a search of Welch's purse. The court found that the government had not shown that McGee had joint use of Welch's

---

issue on appeal, Gov't C.A. Br. 14-17, the court of appeals addressed only the question of apparent authority. Pet. App. 9-10. On Christopher Clarke's appeal, however, the court of appeals correctly held that Latimer did have actual authority to consent to a search of the toolbox, because "when Clarke hired Latimer to transport the toolbox to his brother, he took the risk that Latimer would consent to a search of the car and the toolbox. * * * Where the very purpose of retaining Latimer was to transport drugs in a container, Latimer plainly possessed authority to consent to a search of that container. It makes no difference that the toolbox was locked since the courier was well aware of its contents and hid the box in the wheelwell of the car." *United States* v. *Clarke*, 2 F.3d 81, 85 (4th Cir. 1993), petition for cert. pending, No. 93-6938.

purse, and he therefore lacked actual authority to consent to its search. 4 F.3d at 764. The court also found that the officers had no reasonable basis for believing that McGee had apparent authority to search what was obviously "a woman's purse." *Id.* at 763, 765. The security officers "knew that 1) [Welch] was McGee's girlfriend, 2) she had travelled with him to Las Vegas in the rental car, and 3) the handbag in the trunk of the car belonged to a woman." *Id.* at 765. Moreover, there was "no evidence that Welch was aware of McGee's actions or had any knowledge that the officers desired to conduct a search of any kind." *Ibid.* Under those circumstances, the court concluded that a reasonable officer would not have assumed that McGee was authorized to consent to a search of his girlfriend's purse, but would have made a further inquiry to determine his authority to do so. *Ibid.*

Welch is not in conflict with this case. This was not a case in which officers searched a purse or a similarly private item in reliance on the consent of a third party, while the known owner was nearby and available to be requested to consent. Rather, in this case, Trooper Wilkinson did precisely what the Ninth Circuit said the security officers in *Welch* should have done, *i.e.*, ask Latimer's companion if the toolbox belonged to him. When Womack denied ownership, it was reasonable for Wilkinson to conclude that the consent given by Latimer, the driver of the car, was effective as to the toolbox found in the trunk. There was nothing about the nature of the toolbox, which was not a container in which "a person possesses the highest expectations of privacy," *Welch*, 4 F.3d at 764,

that should have made the officer question in any way whether Latimer's consent was sufficient.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

VICKI S. MARANI
Attorney

FEBRUARY 1994